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Peri & Son's Farms, Inc.

THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

WILLIAM HERRON, an individual, Plaintiff, v. PERI & SON'S FARMS, INC., a domestic corporation, Defendant.	CASE NO.: 3:13-cv-00075- LRH-VPC **DEFENDANT PERI & SONS FARMS, INC.'S MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant Peri & Sons Farms, Inc. ("Peri & Sons"), by and through its undersigned counsel of record, hereby moves to dismiss the complaint (the "Complaint") of Plaintiff William Herron ("Herron") for failure to state a claim upon which relief may be granted.

This Motion is made and based on the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction.

Herron accuses Peri & Sons of terminating his employment because he is disabled, but Herron fails to identify the disability he suffers or how that unknown disability allegedly limits a major life activity. Herron further accuses Peri & Sons of failing to accommodate his unidentified disability, but he fails to state the reasonable accommodation he requested. Herron

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goes on to claim that he was asked "to do something outside of his regular job duties," but he never identifies what Peri & Sons asked him to do outside of his duties as a mechanic. Herron's two-page complaint is accordingly devoid of facts that must be alleged to state a claim for relief under the Americans with Disabilities Act ("ADA"), and this Court should dismiss the Complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

II. Herron's Complaint.

Herron alleges that he resides in Lyon County, Nevada and worked as a mechanic for Peri & Sons from December 8, 2011 until January 17, 2012. *See* Complaint at ¶¶ 2 and 4. Herron further alleges that "[a] few days prior to [his] termination, [he] was requested to perform dash work [and he] advised his supervisor he was unable to complete the task due to his disability." *See id.* at ¶ 5. According to the Complaint, Peri & Sons' shop supervisor then informed Herron on January 17, 2012 that he was being laid off due to budget cuts, but this was a pretext for disability discrimination because shortly after the lay-off occurred, Peri & Sons placed an advertisement for a mechanic position on the internet. *See id.* at ¶ 6. Based on these bare allegations, Herron claims that his termination violated the ADA, *see id.* at ¶ 14, because (i) his lay-off "was a pretext for disability discrimination," (ii) he "could perform the essential functions of his position with or without reasonable accommodation," and (ii) he "was requested to do something outside of his regular job duties, and requested a reasonable accommodation, [sic] [Peri & Sons] failed to interact with Plaintiff as required under the law." *Id.* at ¶¶ 7 and 9.

III. Legal Argument.

A. Legal Standard for Motion to Dismiss.

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a complaint should be dismissed when it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To state a claim for relief and withstand a motion to dismiss pursuant to Rule 12(b)(6), a complaint must plead facts sufficient to show that the plaintiff's case is plausible, not merely possible. *See Achcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009). A formulaic recitation of a cause of action with conclusory allegations is accordingly insufficient to state a claim upon which relief may be granted. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Here, Herron's Complaint lacks the facts needed to support a claim under the ADA, and the Complaint should be dismissed.

B. Herron Has Failed to Allege a Claim for Relief Under the ADA.

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). To allege an unlawful discharge claim under the ADA, a plaintiff must allege (i) he is a disabled person with the meaning of the ADA, (ii) he is a qualified individual with a disability, and (iii) he suffered an adverse employment action because of his disability. *See Hutton v. Elf Atochem North America, Inc.*, 273 F.3d 884, 891 (9th Cir. 2001).

The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). In the Complaint, Herron does not identify his purported disability, and he does not allege that his unidentified disability limits a major life activity. Instead, Herron simply alleges that "[a] few days prior to [his] termination, [he] was requested to perform dash work. Plaintiff advised his supervisor he was unable to complete the task due to his disability." This bare assertion of an unknown and unidentified disability fails to allege a disability discrimination claim under the ADA. *See, e.g.*, *Williams v. Gold Coast Hotels and Casinos,* No. 2:11-cv-2112-KJD-CWH, 2012 WL 3809255 at * 5 (D. Nev. Sept. 4, 2012) (dismissing disability discrimination claim because "Plaintiff has only made the bare assertion that she is disabled without legibly identifying her disability."); *see also Levine v. Smithtown Central School Dist.*, 565 F. Supp. 2d 407, 422 (E.D.N.Y. 2008) ("To meet the first ADA definition of disability, (1) a plaintiff must show that she suffers from a physical or mental impairment; (2) the plaintiff must identify the activity that is claimed to be impaired and establish that such activity constitutes a 'major life' activity; and (3) the plaintiff

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must show that her physical and mental impairment 'substantially limits' the identified 'major life activity.'").

Furthermore, Herron fails to allege any facts to support his assertion that he is qualified for a mechanic position at Peri & Sons or that he was actually terminated as a result of his alleged disability. *Cf. Burns v. Coca-Cola Enterprises, Inc.*, 222 F.3d 247, 256 (6th Cir. 2000) (plaintiff must establish he is qualified by showing he possesses the prerequisites for the position, such as the required skill set, and can perform the essential functions of the position). Herron only alleges, in a wholly conclusory fashion, that he "could perform the essential functions of his position" and that his lay-off "was a pretext for disability discrimination." These conclusions are insufficient because they contain no facts that render Herron's claim under the ADA plausible. In fact, Herron does not even state what the alleged essential job functions of his position were. Indeed, the Complaint makes the illogical suggestion that Peri & Sons' shop supervisor terminated Herron's employment, under the guise of a lay-off, because he learned that Herron had an unidentified disability. If the shop supervisor was not informed of the nature of Herron's disability, as the Complaint alleges, the disability could not have plausibly been a motivating factor in Herron's termination. Thus, the Complaint fails to allege an unlawful discharge claim under the ADA.

Herron also appears to claim that Peri & Sons violated the ADA by failing to accommodate his unspecified disability. *See Complaint at* ¶¶ 9 and 10. To establish a prima facie case for failure to accommodate under the ADA, a plaintiff must allege that (i) he is disabled within the meaning of the ADA, (ii) he is a qualified individual capable of performing the essential functions of the job with reasonable accommodation, and (iii) he suffered an adverse employment action because of his disability. *See Samper v. Providence St. Vincent Medical Center*, 675 F.2d 1233, 1237 (9th Cir. 2012). This claim is as equally flawed as Herron's unlawful discharge claim.

First, Herron does not identify the reasonable accommodation he requested or how Peri & Sons failed to entertain the requested accommodation. *See Complaint* at ¶ 9. Second, Herron again fails to identify the disability that he suffers, and he does not allege how the disability could have been reasonably accommodated. *See id.* at ¶¶ 5, 7, and 9. Third, Herron fails to identify what Peri & Sons asked him to do that was "outside of his regular job duties." *See id.* Instead, Herron simply alleges that he was asked to "perform dash work" which would fall within the duties of a mechanic. *See id.* at ¶ 5. Herron has accordingly failed to allege facts sufficient to support a failure to accommodate claim under the ADA, and the Complaint should be dismissed for failure to state a claim upon which relief may be granted.

IV. Conclusion.

For all the foregoing reasons, Peri & Sons respectfully requests that this Court dismiss Herron's Complaint for failure to state a claim upon which relief may be granted.

DATED this 12th day of March, 2013.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that on the 12th day of March, 2013, I served a true and correct copy of the foregoing **DEFENDANT PERI & SONS FARMS, INC.'S MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM** by electronic transmission to the parties on electronic file and listed below:

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/s/ Marcia Filipas
Marcia Filipas

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